Supreme Court, U.S.
FILED

No. 95 179

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Jose Mayorga-Perez,
Petitioner,

v.

Immigration and Naturalization Service,
Respondent.

Petition for Review to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an alien must accumulate seven years of unrelinquished domicile after becoming a permanent resident in order to be eligible for relief under Immigration and Nationality Act section 212(c) [8 U.S.C. section 1182(c)].

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OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Ninth Circuit (Appendix, infra, pp. A-1 to A-8) is unreported. The decision of the Board of Immigration Appeals (Appendix, infra, pp. A-9 to A-15) is unreported.

JURISDICTION

The memorandum decision of the Court of Appeals for the Ninth Circuit was entered on March 23, 1995. Petitioner timely filed a Petition for Rehearing and suggestion for a rehearing en banc. The court below entered an order (Appendix, infra, pp. A-16 to A-17) denying the petition on May 1, 1995. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Immigration and Nationality Act

("INA") section 212(c) [8 U.S.C. section 1182(c)] provides in relevant part as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)).

STATEMENT OF THE CASE

On June 17, 1988, the petitioner was served with an Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien ("OSC") issued by the Immigration and Naturalization ("INS"). The OSC charged that petitioner was subject to deportation pursuant to Section 241(a)(11) of the Immigration and Nationality Act ("INA") for having been convicted of a drug offense.

On January 18, 1989, petitioner filed

an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191) [so-called section 212(c) waiver] with the INS.

On April 4, 1989, a deportation hearing was held. Through counsel, petitioner admitted the allegations in the OSC. The Immigration Judge ("IJ") found petitioner deportable. In regard to petitioner's application for a section 212(c) waiver, the IJ held that since the petitioner had only been a lawful, permanent resident of the United States for five years and 10 months, in spite of his many possible equities in the United States, he was statutorily ineligible for a waiver of excludability and deportability under Section 212(c) of the Act and that his application for the 212(c) waiver would be denied. The IJ ordered that petitioner be deported to Mexico.

Petitioner appealed the decision of the IJ to the Board of Immigration Appeals ("BIA"). In its decision dated July 30, 1993, the BIA affirmed the IJ's decision.

On October 15, 1993, petitioner filed a petition for review of the order of deportation with the Court of Appeals for the Ninth Circuit ("Ninth Circuit") pursuant to 8 U.S.C. section 1105a(a). In a Memorandum decision filed March 23, 1995, the Ninth Circuit denied the petition for review (Appendix, infra, pp. A-1 to A-8).

STATEMENT OF THE FACTS

Petitioner was born on September 19, 1949 in Mexico. Petitioner first entered the United States during of summer of 1975. Petitioner and his wife SOCORRO SOLIS have seven children all of whom are United States citizens by birth, namely, CONRADO MAYORGA born May 16, 1976

in Los Angeles, California; SUSANA MAYORGA born October 18, 1977 in San Francisco, California; ERNESTO MAYORGA, born January 23, 1979, in San Francisco, California; JOSE MAYORGA, born March 30, 1986 in Stockton, California; LUIS ENRIQUE MAYORGA born July 24, 1987 in Stockton, California; SYLVESTER MAYORGA born August 22, 1989 in Lodi, California; and, MARIA VICTORIANA MAYORGA born August 3, 1991 in Stockton, California.

On June 2, 1977, the INS issued petitioner a "Silva letter" thus allowing him to remain in this country until his visa became available. On June 25, 1983, petitioner entered the United States, as a permanent resident.

On January 5, 1988, petitioner was convicted in the United States District Court, District of Arizona, of a drug offense and deportation proceedings were

thereafter initiated against him.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit conflicts with decisions in other court of appeals. [S. Ct. R. 10.1(a)]

In Castillo-Felix v. INS, 601 F. 2d 459 (9th Cir. 1979) the court, in a majority decision, gave deference to the INS' interpretation and held that to be eligible for 212(c) relief [8 U.S.C. section 1182(c)] aliens must accumulate seven years of lawful unrelinquished domicile after their admission for permanent residence. Id. at 467. In its decision below, the court felt compelled to follow the decision in Castillo-Felix. (Appendix, infra, pp. A-3 to A-4).

The position taken by the Ninth Circuit is directly contrary to that taken in other court of appeals. In

Lok v. INS, 548 F.2d 37 (2d Cir. 1977), the court held that aliens may possess a lawful domicile in the United States without being admitted for permanent residence and therefore 212(c) does not require aliens to accumulate seven years of lawful unrelinquished domicile after admission as a permanent resident. Id. at 40-41.

In Castellon-Contreras v. INS, 45 F.3d 149 (7th Cir. 1995), the court interpreted the meaning of "lawful unrelinquished domicile" under section 212(c). The court stated that "[i]n order to have a 'lawful domicile,' then, an alien must have the ability, under the immigration laws, to form the intent to remain in the United States indefinitely." Id. at 153. The court held that lawful domicile has a meaning distinct from lawful permanent residence (Id. at 153)

and that it could not "defer to the °BIA's interpretation of 212(c) because the plain meaning of the term 'lawful unrelinquished domicile' . . . does not lead to either an absurd result, or one at odds with Congressional policy" (Id. at 153). The court specifically disagreed with the Ninth Circuit when it stated that ". . . we cannot accept the contention, as does the Ninth Circuit, that Congress needed to more clearly indicate its intent to benefit these domiciliaries in this manner". Id. at 154. The court then concluded that aliens could become lawful domiciliaries without first obtaining lawful permanent residence status. Id. at 154.

CONCLUSION

This Court should review this case to establish uniformity in this important area of immigration law and establish

equal justice for all permanent resident aliens. For these reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: MAR 23, 1995

JOSE MAYORGA-PEREZ, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 93-70826 INS No. A37 735 952 **MEMORANDUM***

Petition to Review a Decision of the Board of Immigration Appeals

Submitted ** March 16, 1995
San Francisco, California

Before: NORRIS, WIGGINS, and FERNANDEZ, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Jose Mayorga-Perez appeals a decision of the Board of Immigration Appeals ("BIA") that he is statutorily ineligible for discretionary relief from deportation under section 212(c), 8 U.S.C. section 1182(c). We have jurisdiction pursuant to 8 U.S.C. section 1105a(a), and we deny Mayorga-Perez' petition for review.

I

Mayorga-Perez first argues that he is statutorily eligible for relief under section 212(c) because he entered the United States more than seven years before his deportation hearing. Section 212(c) provides discretionary relief from deportation to permanent resident aliens who have been lawfully domiciled in the United States for seven consecutive years. 8 U.S.C. section 1182(c); Tapia-Acuna v. INS, 640 F.2d 223, 224 (9th Cir. 1981). Seven years of lawful

unrelinquished domicile must be accumulated after an alien is admitted for permanent residence. Castillo-Felix v. INS, 601 F.2d 459, 467 (9th Cir. 1979). Although he first entered the United States in 1975, Mayorga-Perez did not obtain permanent resident status until June 25, 1983. Thus, at the time of his deportation hearing on January 18, 1989, Mayorga-Perez had been a lawful permanent resident for only five years and ten months, rendering him ineligible for relief under section 212(c).

Mayorga-Perez maintains that we should overrule our decision in Castillo-Felix in order to credit the time he spent in the United States prior to being admitted as a permanent resident. We are bound, however, by the law of this circuit absent en banc review or an intervening Supreme Court

decision.[1] Landreth v. Commissioner, 859 F.2d 643, 648 (9th Cir. 1988).

II

Mayorga-Perez next argues that the INS is estopped from denying his eligibility for relief under section 212(c) because his ability to obtain permanent status was delayed by government error. Although the Supreme Court has left open the question of whether an estoppel claim could ever succeed against the

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[1] Mayorga-Perez argues that because the statutory scheme of discretionary relief has changed, we may reinterpret the domicile requirement of section 212(c). The relevant portions of the statute, however, have not been amended.

Mayorga-Perez also argues that the BIA's development of an "outstanding equities" test in the context of 212(c) mandates that we revisit Castillo-Felix. This test, however, guides the exercise of discretion under section 212(c) once eligibility has been determined. Thus, this development has no bearing on our interpretation of the eligibility requirements.

government, it recently observed that "we have reversed every finding of estoppel that we have reviewed." Office of Personnel Mgmt. v. Richmond, 110 S. Ct. 2465, 2470 (1990). In any event, equitable estoppel may be invoked in immigration cases only "if the governmental conduct complained of amounts to 'affirmative misconduct'." Santiago v. INS, 526 F.2d 488, 491 (9th Cir. 1975).[2] Neither delay, negligence, nor neglect is sufficient to warrant estoppel. Mukherjee v. INS, 793 F.2d 1006, 1008-09 (9th Cir. 1986) (no misconduct where government official gave mistaken information to alien); INS v. Miranda,

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[2] In addition, a party asserting estoppel against the federal government must show that "the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." Mukherjee v. INS, 793 F.2d 1006, 1008-09 (9th Cir. 1986).

459 U.S. 14 (1982).

Here, Mayorga-Perez' application for permanent resident status was allegedly delayed because of an erroneous charging policy. Between 1968 and 1976, 144,999 Cuban refugees were granted permanent resident status pursuant to the Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (1966). The visa numbers assigned to refugees were charged against the Western Hemisphere immigration quota of 120,000 per year, making those visa numbers unavailable to applicants from Western Hemisphere countries other than Cuba. The Attorney General later determined that the Cuban charging was in error and an injunction was issued to force the recapture and reassignment of the visa numbers. See Silva v. Bell, 605 F.2d 978, 980-81 (7th Cir. 1979). Although

the INS' initial misinterpretation undoubtedly delayed many applications for permanent residence, a good-faith interpretation of a statute that results in such delay is insufficient to support an estoppel claim against the government.

III

Finally, petitioner argues that we should stay this petition for review pending the BIA's ruling on his motion to reopen. We have discretion to stay proceedings when a motion to reopen has been filed. Berroteran-Melendez v. INS, 955 F.2d 1251, 1254-55 (9th Cir. 1992). As in Berroteran-Melendez, however, we elect not to stay this proceeding because "the potential for abuse of the process to circumvent the BIA's discretionary power to grant or deny a stay of deportation pending a motion to reopen

outweighs concerns with efficiency." Id. at 1255.

Unlike a "petition for review, which automatically stays the order of deportation, an administrative motion to reopen filed with the BIA does not provide an automatic stay of deportation." Berroteran-Melendez, 955 F.2d at 1254 n.2. Rather, the BIA is given discretion to grant or deny a stay of deportation pending a motion to reopen. Consequently, the practice of suspending appellate proceedings under these circumstances "would effectively create an automatic stay of deportation pending the outcome of a motion to reopen," despite the statutory mandate that stays be discretionary rather than automatic. Id. at 1255 (citing Alleyne v. INS, 879 F.2d 1177, 1181-82 n.7 & 8 (3d Cir. 1989)).

The petition for review is **DENIED.**

U.S. Department of Justice

Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: Jul 30 1993

File: A37 735 952 - San Francisco

In re: JOSE MAYORGA-PEREZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Maurice Moyal, Esquire
1899 Clayton Road, Suite 100

ON BEHALF OF SERVICE:

Thomas L. Day
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. section 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Section 212(c) waiver of inadmissibility

ORDER:

PER CURIAM. The appeal is dismissed. We have reviewed the record of proceedings and have considered the respondent's contentions as advanced on his Notice of Appeal filed on April 14, 1989, and in his appeal brief filed on May 8, 1990. In his oral decision dated April 4, 1989, the immigration judge found the respondent deportable as charged under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. section 1251(a)(11), denied his application for a waiver of excludability under section 212(c) of the Act, 8 U.S.C. section 1182(c), and ordered him deported from the United States to Mexico. The decision of the immigration judge is affirmed based upon and for the reasons set forth in that decision. See Matter of Edwards, Interim Decision 3134 (BIA

1990); Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988); Matter of Marin, 16 I&N Dec. 581 (BIA 1978).

We concur with the immigration judge that the respondent was statutorily ineligible for section 212(c) relief as lacking the requisite 7 years' lawful unrelinquished domicile. According to the Order to Show Cause issued on June 17, 1988, the respondent was admitted to the United States as an immigrant on June 25, 1983. On appeal, the respondent argues that he had the 7 years' lawful domicile required under section 212(c) dating from June 2, 1977, when he was granted protected status under Silva v. Bell, 605 F.2d 978 (7th Cir. 1979), modifying Silva v. Bell, No. 76-C 4268 (N.D. Ill. Oct. 10, 1978). Despite such assertion, we have consistently held that the acquisition of lawful domicile

time for the purpose of eligibility under section 212(c) must be subsequent to the date of admission as a lawful permanent resident. See Matter of Kim, 17 I&N Dec. 144 (BIA 1979); Matter of Newton, 17 I&N Dec. 133 (BIA 1979); Matter of Anwo, 16 I&N Dec. 293 (BIA 1977), aff'd, Anwo v. INS, 607 F.2d 435 (D.C. Cir. 1979); Matter of S-, 5 I&N Dec. 516 (BIA 1953); see also Chiravacharadhikul v. INS, 645 F.2d 248 (4th Cir.), cert. denied, 454 U.S. 893 (1981); Avila-Murrieta v. INS, 762 F.2d 1442, 1444 (9th Cir. 1984); Castillo-Felix v. INS, 601 F.2d 459, 467, (9th Cir. 1979). 1/

Further on appeal, the respondent

1/ Among the federal Courts of Appeal only the Second Circuit has held that "lawful domicile" for 7 years does not require "permanent residence" for that period insofar as enabling an alien to qualify for section 212(c) relief. See Lok v. INS, 681 F.2d 107, 108-10 (2d Cir. 1982).

maintains that the Immigration and Naturalization Service should be estopped from relying on the June 25, 1983, date as the date of his admission for lawful permanent residence, asserting that he would have been granted lawful permanent resident status years earlier but for the Service's alleged misconduct due to its delay in processing his visa application given the facts underlying Silva v. Bell, 605 F.2d 978, supra. 2/

2/ In Silva v. Bell, the Court of Appeals for the Seventh Circuit granted relief in the form of a program to recapture and reissue immigrant visa numbers that previously had been erroneously charged against the Western Hemisphere quota upon the adjustment of status of Cuban refugees to that of lawful permanent residents. 605 F.2d at 980-83. According to injunctions that were in effect until all available immigrant visas were reallocated in the case, the Service was not to undertake or pursue efforts to expel any alien who was a native of a Western Hemisphere country and who had a visa priority date between July 1, 1968, and December 31, 1976, provided he or she

As we previously have held, the Board and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. See Matter of Hernandez-Puente, Interim Decision 3153 (BIA 1991). Equitable estoppel is a judicially devised doctrine that precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or a defense, regardless of its substantive validity. M.D. Phelps v. Federal Emergency Management Agency, 785 F.2d 13 (1st

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entered the United States prior to March 11, 1977. See Silva v. Bell, No. 76-C4268 (N.D. Ill. Nov. 9, 1979), enforcing 605 F.2d 978, supra; Silva v. Levi, No. 76-C4268 (N.D. Ill. April 1, 1977); see also Matter of Torres, 19 I&N Dec. 371 (BIA 1986); Matter of Pimentel, 17 I&N Dec. 482 (BIA 1980).

Cir. 1986). Estoppel is an equitable form of action with only equitable rights recognized. Keado v. United States, 853 F.2d 1209 (5th Cir. 1988). By contrast, this Board, in considering and determining cases before it, can only exercise such discretion and authority conferred upon the Attorney General by law. 8 C.F.R. section 3.1(d)(1) (1992). Our jurisdiction is defined by the regulations, and we have no jurisdiction unless it is affirmatively granted by the regulations. Matter of Hernandez-Puente, supra; Matter of Sano, 19 I&N Dec. 299 (BIA 1985); Matter of Zaidan, 19 I&N Dec. 297 (BIA 1985).

Accordingly, we have affirmed the immigration judge's decision.

David L. Milhollan
FOR THE BOARD

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: MAY 1, 1995

JOSE MAYORGA-PEREZ,	)	No. 93-70826
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
IMMIGRATION AND NATURALIZATION SERVICE,	)	
	)	
Respondent.	)	
	)	

Before: NORRIS, WIGGINS, and FERNANDEZ, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Wiggins and Fernandez have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.